COURT OF APPEAL FOR ONTARIO

CITATION: Andros v. Colliers Macaulay Nicolls Inc., 2019 ONCA 679
DATE: 20190830
DOCKET: C65509

Tulloch, Hourigan and Fairburn JJ.A.

BETWEEN

Demetri Andros

Plaintiff (Respondent/
Appellant by way of cross-appeal)

and

Colliers Macaulay Nicolls Inc.

Defendant (Appellant/
Respondent by way of cross-appeal)

George Avraam and Jennifer Bernardo, for the appellant

Andrew Pinto and Jonas Granofsky, for the respondent

Heard: April 26, 2019

On appeal from the order of Justice Bernadette Dietrich of the Superior Court of Justice, dated May 9, 2018, with reasons reported at 2018 ONSC 1256, 46 C.C.E.L. (4th) 207.

Fairburn J.A.:

OVERVIEW

[1] The respondent worked for the appellant, a large commercial real estate company, from September 2001 to August 2004, when he left for other employment. He returned to the appellant's employ in February 2009 as a Senior Associate and was quickly promoted to the position of Managing Director. The terms of his employment included a base salary and yearly bonus.

[2] It is not in dispute that the respondent's employment was terminated without cause on January 19, 2017. Nor is it in dispute that upon termination the respondent received what he was entitled to under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*"), including a lump-sum payment in lieu of notice of termination representing eight weeks of salary, coverage for all benefits during that notice period, and a lump-sum severance payment representing about 12 weeks of salary. Despite having received a bonus for each year that he had been employed as a Managing Director, the respondent did not receive any compensation for the bonus he would have earned for the period of time that he worked between the start of the new year and his termination (January 1 to 19, 2017) or for the period of time that was covered by notice under the *ESA*.

[3] The respondent brought an action for wrongful dismissal. The parties agreed that the matter could be resolved by way of summary judgment. The respondent argued that he was owed damages for: (a) reasonable notice under the common law; (b) benefits he would have been entitled to during that

reasonable notice period; and (c) the bonus he would have earned as an integral and non-discretionary part of his compensation package.

[4] The respondent argued that the termination provision in his employment agreement is unenforceable because it attempts to contract out of employment standards in the *ESA*. Given the unenforceability of the termination provision, the respondent said that he was entitled to a period of notice in accordance with what was reasonable under the common law.

[5] The termination provision is found within clause four of the employment agreement:

> 4. Term of Employment
>
> …
>
> The company may terminate the employment of the Managing Director by providing the Managing Director the greater of the Managing Director's entitlement pursuant to the Ontario *Employment Standards Act* or, at the Company's sole discretion, either of the following:
>
> > a. Two (2) months working notice, in which case the Managing Director will continue to perform all of his duties and his compensation and benefits will remain unchanged during the working notice period.
> >
> > b. Payment in lieu of notice in the amount equivalent of two (2) months Base Salary. [Emphasis added.]

Throughout these reasons, I will refer to the first part of the termination clause – "entitlement pursuant to the Ontario [*ESA*]" – as the "first clause", and to clauses 4(a) and 4(b) by those names.

[6] I read the motion judge as coming to two central conclusions in determining that the respondent was owed damages reflecting his base salary for a period of eight months, minus twelve weeks he had already been compensated.[1]

[7] First, the motion judge made a finding that the termination clause could reduce "the benefits to which [the respondent] could be entitled on termination to something less than he would be entitled to under the *ESA*." Among other things, she found that upon termination the respondent would be entitled to both benefits and severance under the *ESA.* Yet, if clause 4(a) applied, it did not provide for severance and, if clause 4(b) applied, it did not provide for benefits. (I would add that clause 4(b) does not appear to provide for severance either.) Accordingly, she concluded that the *ESA* had been contracted out of and the entire termination clause is unenforceable.

[8] Second, despite having already made the finding that the *ESA* had been contracted out of, the motion judge went on to make an alternative finding that, at

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[1] It appears that the motion judge subtracted the twelve weeks of severance pay that the respondent had already been compensated, rather than the eight weeks of payment in lieu of notice, from the reasonable period of common law notice granted. The parties do not take issue with this approach.

its very “best”, the termination clause was unclear as to whether clauses 4(a) and 4(b) included statutorily-compliant severance and benefits. On that alternative basis, the motion judge found that the respondent would not have known the nature of his entitlements with certainty at the time he signed the employment agreement (in particular, he would not have known whether he would be paid severance if clause 4(a) were applied, or if he would be paid benefits if clause 4(b) were applied). Accordingly, she concluded that the termination clause did not clearly satisfy the obligation to pay the respondent his statutory entitlements and, therefore, the clause was unenforceable on this basis as well.

[9] Although damages for lost benefits would typically be granted for the duration of the applicable notice period, the motion judge found that the respondent had failed to provide evidence of actual loss incurred as a consequence of his loss of benefits during the eight-month period she imposed. This resulted in a refusal to order damages to be paid for lost benefits during that time.

[10] As for the bonus, the motion judge found as a fact that it was an integral and non-discretionary part of the respondent’s compensation package over the almost eight years he had been a Managing Director. The motion judge therefore concluded that the respondent was entitled to compensation for the bonus he earned while he was still employed and for the bonus he would have earned

during the eight-month notice period to which she found he was entitled at common law.

[11] The appellant appeals on the basis of two alleged errors:

(i) the motion judge erred by deciding that the termination clause was unenforceable; and

(ii) the motion judge erred by concluding that the respondent should receive a *pro rata* share of his bonus for the period he worked from January 1 to January 19, 2017 and for the eight-month period of reasonable notice under the common law.

[12] The respondent cross-appeals, contending that the motion judge erred by failing to grant him compensation for his loss of benefits during the eight-month period of notice.

[13] For the reasons that follow, I conclude that the appeal should be dismissed and the cross-appeal granted.

ANALYSIS

(1) The Motion Judge Did Not Err in Finding the Termination Clause Unenforceable

The Appellant's Position

[14] On the facts of this case, the *ESA* required the appellant to provide the following to the respondent:

(i) eight weeks' notice or pay in lieu of notice (ss. 57(1)(h), 60(1)(a), 60(1)(b), 61(1)(a));[2]

(ii) eight weeks' continuation of benefits (ss. 57(1)(h), 60(1)(c), 61(1)(b)); and

(iii) eleven weeks' severance pay (ss. 63(1), 64(1)(a), 65(1), 65(2), 65(4)).

[15] The appellant argues that the termination clause provides at least the statutory minimum amount of pay in lieu of notice and preserves the statutory entitlements to severance pay and continuation of benefits. The appellant contends that, regardless of whether the "greater" entitlement was under the first clause or clauses 4(a) or 4(b), the termination clause ensured that the respondent would always receive his minimum statutory entitlements under the *ESA*. The appellant characterizes the reference to the "greater of" at the outset of the termination clause as the "failsafe" clause, meaning that even if clauses 4(a) or 4(b) applied, the minimum statutory entitlements relating to benefits and severance would be provided under those clauses.

[16] The appellant suggests that the motion judge made three extricable errors of law, reviewable on a correctness standard, in her interpretation of the termination clause: (a) she failed to interpret the clause as a whole; (b) she read ambiguity into clauses 4(a) and 4(b) where there was none; and (c) she failed to

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[2] The respondent's combined service to the appellant was more than eight years.

appreciate that there was no need for a specific reference to statutory entitlements in clauses 4(a) and 4(b) for those entitlements to apply.

[17] I will now explain why I do not accept that the motion judge committed an extricable error of law in her interpretation of the termination clause. In the absence of an extricable error of law, the motion judge's interpretation of the contract is entitled to deference: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50-55; *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481, at para. 43; *Hampton Securities Limited v. Dean*, 2018 ONCA 901, 51 C.C.E.L. (4th) 244, at para. 5, leave to appeal refused, [2019] S.C.C.A. No. 34. Applying that deference, I see no basis to intervene.

General Principles: Interpreting Termination Clauses

[18] There is a common law presumption that an employee's dismissal without cause will only take place on reasonable notice to that employee. That presumption is rebutted only "if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly" (emphasis added): *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 998; *Wood,* at paras. 15, 28. If the common law presumption of reasonable notice has not been clearly rebutted, then the employee is entitled to pay in lieu of notice for the reasonable period under the common law.

[19] The *ESA* contains employment standards distinct from those at common law. An employment standard is defined in s. 1(1) to mean a "requirement or prohibition" under the *ESA* that applies to an employer for an employee's benefit. Subsection 5(1) of the *ESA* prevents employers, employees and their agents from contracting out of or waiving "an employment standard". The length of notice of termination, the payment of benefits during notice periods, and the payment of severance all constitute "requirements" applying to an employer for an employee's benefit, and therefore constitute employment standards. These employment standards cannot be contracted out of unless the contract is for a "greater benefit" than what the *ESA* provides for: *ESA*, s. 5(2).

[20] It is not possible to simply void the part of a termination clause that offends the *ESA*. If a termination clause purports to contract out of an employment standard without clearly substituting a greater benefit in its place, the entire termination clause is void: *North v. Metaswitch Networks Corporation,* 2017 ONCA 790, 417 D.L.R. (4th) 429, at para. 24; *Hampton Securities Limited*, at para. 7. As Laskin J.A. said in *Wood,* at para. 21: "Contracting out of even one of the employment standards and not substituting a greater benefit would render the termination clause void and thus unenforceable": see also paras. 64, 69. This is true even if the employee actually receives his or her statutory entitlements after termination. Accordingly, the enforceability of a termination clause is

determined by the wording of the clause alone, not by an employer's conduct after termination: *Wood*, at paras. 43-44.

Did the motion judge fail to interpret the termination clause as a whole?

[21] The appellant says that the motion judge contravened a fundamental legal principle of contractual interpretation by failing to consider the termination clause as a whole: *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571, 424 D.L.R. (4th) 169, at para. 59. According to the appellant, the motion judge improperly considered clauses 4(a) and 4(b) in isolation from the first clause when she found that they did not include some of the statutory entitlements. The appellant maintains that the first clause, which imports *ESA* entitlements by specific reference, also cloaks clauses 4(a) and 4(b) in those same statutory entitlements given that the whole clause insists on the "greater" entitlements being imposed.

[22] I do not agree that the motion judge erred in this respect. I do not read her reasons as interpreting clauses 4(a) and 4(b) in isolation. To the contrary, the motion judge interpreted the clause as a whole. She set the entire clause out early in her reasons, including the first part of the clause that refers to the *ESA.* She also acknowledged the first clause on other occasions. Her reasons demonstrate her conclusion that she interpreted the word "or" as separating the first clause from clauses 4(a) and 4(b). For instance, as she observed when summarizing the appellant's position, "[u]nder that provision, [the respondent] was entitled to the notice specified in the agreement, or notice in accordance with

the *ESA,* whichever was greater.” She clearly interpreted the termination clause as a whole, viewing the first clause as separate and distinct from clauses 4(a) and 4(b).

[23] I see no error in the motion judge’s approach to the word “or” as indicative of the disjunctive nature of the contents of the termination clause. She was right to conclude that the termination clause has two distinct parts. The language of the provision forces a choice between “the greater of”:

(i) “entitlement pursuant to the Ontario [*ESA*]” (the first clause); “or”

(ii) at the employer’s “sole discretion”, either:

   a. two months’ working notice with compensation and benefits “during the working notice period” (clause 4(a)); or

   b. “[p]ayment in lieu of notice in the amount equivalent to two (2) months [b]ase [s]alary” (clause (4(b)).

[24] As the respondent points out, the termination clause required that a choice be made between which part of the clause comprised the “greater”: the first part of the clause (“entitlement pursuant to the Ontario [*ESA*]”), or entitlement under clauses 4(a) or 4(b). In light of the disjunctive nature of the clause, it was open to the motion judge to find that the first clause did not cast the *ESA* statutory entitlements upon clauses 4(a) and 4(b).

[25] Given the motion judge’s finding that the termination clause contained two distinct and separate parts, it is unsurprising that she went on to consider the

meanings of clauses 4(a) and 4(b) standing on their own. She did not, as the appellant suggests, fail to interpret the termination clause as a whole.

Did the motion judge find ambiguity where there was none?

[26] The appellant maintains that the motion judge erred when she found that: "[a]t best, the termination provision in [the respondent's] employment contract is unclear or ambiguous as to whether he would have been entitled to severance had clause 4a applied on his termination, and employee benefits had clause 4b then applied." This statement, however, must be read in its context. The motion judge immediately went on to observe that when a termination clause is unclear or can be interpreted in more than one way, courts should prefer the interpretation that favours the employee: *Ceccol v. Ontario Gymnastics Federation* (2001), 55 O.R. (3d) 614 (C.A.), at paras. 45, 49; *Nemeth v. Hatch Ltd.*, 2018 ONCA 7, 418 D.L.R. (4th) 542, at para. 12. Read contextually, I understand the motion judge's reference to "at best" to mean that, because clauses 4(a) and 4(b) did not clearly include *ESA* entitlements, the best the appellant could argue was that there was ambiguity and that the clauses should be interpreted to include those entitlements. She rightly rejected that argument.

[27] Strictly speaking, given her finding that the *ESA* had been contracted out of under clauses 4(a) and 4(b), it was unnecessary for the motion judge to consider ambiguity. The termination clause was unenforceable given that it contracted out of statutory entitlements without substituting a greater benefit:

Wood, at para. 21. Given that the parties addressed the ambiguity point, though, I will also briefly address it.

[28] The appellant contends that the motion judge erred in straining to find ambiguity where there was none. In support of this argument, the appellant relies upon *Amberber*, at paras. 54 and 62, where this court commented upon a "failsafe provision" that served to modify the other parts of a termination clause, reading them up to comply with the *ESA*. The appellant says that this case is analogous to *Amberber* in the sense that the first clause modifies the whole termination clause, so that the *ESA* minimum entitlements apply to clauses 4(a) and 4(b).

[29] I see no analogy to *Amberber.* The failsafe provision in *Amberber* fell at the end of the "Termination of Employment" clause and read as follows:

> In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.

[30] That is a fundamentally different clause from the operative clause in this case. Here, as previously mentioned, the reference in the first clause to "entitlement pursuant to the Ontario [*ESA*]" does not cloak the entire termination clause. Rather, it is stranded within the first clause, a clause that the motion judge found provided for different entitlements than clauses 4(a) and 4(b).

[31] The parties had contracted that the respondent was entitled to the "greater of" the *ESA* entitlements under the first clause or the entitlements under 4(a) or 4(b), not the greater of the first clause or the latter clauses, combined with elements of the first clause. Although she was not required to do so, I can see no error in the motion judge's finding that, even when clauses 4(a) and 4(b) were taken at their very "best" for the appellant, they contained a lack of clarity about whether the appellant had to pay statutory severance under clause 4(a) and statutory benefits under clause 4(b). I agree with the motion judge that when the respondent signed the employment contract, at its very best from the appellant's perspective, the termination provision was not explicit and the respondent would not have known with certainty what his entitlements at the end of his employment would be. As Laskin J.A. observed in *Wood*, at para. 28, "[e]mployees should know at the beginning of their employment what their entitlement will be at the end of their employment".

[32] I see no error in the view that the incorporation of *ESA* entitlements into the first clause does not apply or, at the very least, does not clearly apply to clauses 4(a) and 4(b). The disjunctive nature of the termination clause and the absence of a reference to *ESA* entitlements in clauses 4(a) and 4(b) (with the exception of "benefits" in clause 4(a)), coupled with the specific reference to *ESA* entitlements in the first clause, support that interpretation.

Did the motion judge err by failing to acknowledge that clauses 4(a) and 4(b) incorporated ESA entitlements by silence?

[33] The appellant relies upon *Roden v. Toronto Humane Society* (2005), 202 O.A.C. 351 (C.A.), and *Nemeth* in support of the proposition that silence about *ESA* entitlements does not entail a contracting out of those entitlements. In other words, the appellant says that the motion judge erred by essentially reading in a clause that excluded the respondent's entitlement to severance pay under clause 4(a) and benefits continuation under clause 4(b).

[34] I agree with the motion judge that *Roden* and *Nemeth* are distinguishable from this case. In both *Roden* and *Nemeth*, the applicable termination clauses referred explicitly to *ESA* entitlements, but only in respect of notice or payment in lieu of notice. In *Roden*, the termination clause set out the employer's obligation to provide the "minimum amount of advance notice or payment in lieu thereof as required by the applicable employment standards legislation": at para. 55. In *Nemeth*, the termination clause referred to the "notice period" as amounting to one week per year of service with a minimum of four weeks "or the notice required by the applicable labour legislation": at para. 3.

[35] In both cases, this court concluded that, the silence of the clauses as it relates to statutory entitlements beyond notice did not work so as to exclude those entitlements. As Gillese J.A. said in *Roden*, at para. 59, while the termination clause did not address benefit plan contributions during the notice

period, it was "silent in respect of the obligation to provide benefits" and did not attempt to limit the employer's obligation. Similarly, Roberts J.A. said in *Nemeth*, at para. 15: "I do not accept that the silence of the termination clause concerning the [employee's] entitlement to severance pay denotes an intention to contract out of the *ESA."*

[36] The motion judge specifically considered both *Roden* and *Nemeth* and concluded that they are distinguishable from this case. As she noted, *Roden* is distinguishable on the basis that the applicable termination clause made "specific reference to the applicable employment standards", yet no such reference is made in clauses 4(a) and 4(b). She concluded that *Nemeth* is distinguishable from this case on the basis that the termination clause only attempted to limit the amount of notice that the employee would have received on termination, but not other statutory entitlements under the *ESA.* The motion judge noted that "in the case at bar, unlike *Nemeth*, there is no referential incorporation of the *ESA* with respect to clauses 4a and 4b."

[37] In contrast to both *Roden* and *Nemeth*, while the first clause in this case specifically incorporates all entitlements to *ESA* statutory minimums in general, including benefits and severance, clauses 4(a) and 4(b) apply in the alternative and do not cover that same ground. Again, the *ESA* entitlements are stuck within the first clause of a disjunctive termination clause.

[38] While some termination clauses explicitly and improperly bar payments that would otherwise be required under the statutory *ESA* scheme (for example, *Hampton Securities Limited v. Dean,* 2018 ONSC 101, 43 C.C.E.L. (4th) 205, at paras. 103-6, aff'd 2018 ONCA 901, 51 C.C.E.L. (4th) 244, at para. 7, leave to appeal refused, [2019] S.C.C.A. No. 34, at para. 7; *Wood*, at para. 3), there is no specific requirement for such language in order to find that the statutory entitlements do not apply. The overriding question is whether the termination clause purports to limit the minimum statutory obligations: *Nemeth*, at para. 15. The focus of the inquiry is on what the parties actually agreed to. While clauses 4(a) and 4(b) may provide an employee with more notice than the first clause, when the termination clause is read as a whole, it purports to limit *ESA* entitlements other than notice and benefits under clause 4(a) and notice under clause 4(b).

[39] This view is fortified when the actual content of clauses 4(a) and 4(b) are considered. Unlike *Roden* and *Nemeth,* the fact is that clause 4(a) is not simply silent as to everything but notice. Rather, it makes specific reference to "compensation and benefits" being unchanged during the working notice period. Yet clause 4(b) makes no reference to benefits. In these circumstances, it cannot be said that the clauses merely suffer from silence as to statutory entitlements. Clause 4(a) suggests that where the employer wanted statutory entitlements to

apply, like “notice … and benefits” (emphasis added), they were specifically adverted to within the clause.

[40] I see no error in the motion judge’s interpretation of the termination clause. I would defer to her conclusion that the termination clause is unenforceable because clauses 4(a) and 4(b) purport to limit the employer’s obligations respecting employment standards.

(2) The Respondent Was Entitled to Compensation for the Bonus He Would Have Earned While Working and During the Notice Period

[41] The motion judge ruled that the respondent was entitled to compensation for the bonus he would have earned while he was still employed from January 1 to 19, 2017. She also concluded that he was entitled to compensation for the bonus he would have earned during the eight-month reasonable notice period to which she found he was entitled at common law.

[42] The motion judge concluded that the bonus was an integral part of the respondent’s compensation. In the last three years of his employment, in addition to what was described as his “Base Salary” under the employment agreement (set at $142,500 when the employment agreement was signed), the respondent received $79,228.25, $127,933.80 and $49,757.51, respectively, in bonus payments.

[43] In addition, the motion judge found that the bonus was non-discretionary in nature. She based that finding, in part, on the wording of the clause that outlined

the respondent's bonus entitlement, which was the second part of the employment agreement's compensation section, immediately following the clause setting out the respondent's "Base Salary". She also grounded that finding in the fact that the respondent had received his bonus during each year he had been employed as a Managing Director.

[44] Having found that the respondent's bonus was non-discretionary in nature and an integral part of his compensation package, the motion judge considered whether there was anything in the employment agreement that removed the respondent's common law entitlement to damages for his lost opportunity to earn his bonus. She turned her mind to whether a clause within the employment agreement – that the respondent be "an employee in good standing with the company at the time bonuses are payable" – disentitled him from damages.

[45] The motion judge found that *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618, 352 O.A.C. 1, applied. In *Paquette*, this court found that a clause in an employment agreement that said a bonus recipient must be "actively employed by TeraGo on the date of the bonus payout", did not disentitle those who are within a notice period from receiving damages in lieu of the bonuses they would have received during the notice period. As van Rensburg J.A. said in *Paquette,* at para. 47:

> A term that requires active employment when the bonus is paid, without more, is not sufficient to deprive an

> employee terminated without reasonable notice of a claim for compensation for the bonus he or she would have received during the notice period, as part of his or her wrongful dismissal damages.

[46] The motion judge analogized the “good standing” clause in this case to the “actively employed” clause in *Paquette.* Accordingly, she ordered that the respondent receive damages in lieu of the bonus he would have earned for the 19-day period that he worked in January 2017, as well as the bonus he would have earned during the eight-month notice period that followed.

[47] The appellant contends that the motion judge erred by failing to appreciate that the *Paquette* principle does not apply in this case. Although the “actively employed” terminology used in the *Paquette* clause may well be the same thing as the “good standing” terminology used in the bonus clause in this case, the appellant says that the motion judge erred by failing to appreciate that, unlike *Paquette,* the respondent in this case was no longer in the notice period when the bonus for 2017 became “payable” in February 2018. The appellant contends that the expiry of the notice period before the payment of the bonus disentitled him to that bonus.

[48] I do not agree.

[49] *Paquette* sets out a two-part test at paras. 30-31 to determine whether damages in lieu of a bonus should be given. The first step is to determine the employee’s common law right. The motion judge concluded that in the

circumstances of this case, where the bonus was such an integral aspect of the respondent's compensation, he had a common law entitlement to the bonus he earned or would have earned. That finding is not challenged on appeal.

[50] The second step is to ask whether there is something in the bonus plan that removes the employee's common law entitlement. The appellant argues that the motion judge erred by focusing only upon the words "good standing". The appellant contends that, although the respondent may well have been in "good standing" during the notice period, that notice period ended before when the bonus was "payable". Accordingly, because the respondent's bonus for 2017 was not payable until February 2018 and because the parties agreed that the respondent needed to be "an employee in good standing with the company at the time bonuses are payable", the appellant argues that the parties contracted out of the common law entitlement to damages for any bonus the respondent earned or would have earned in 2017.

[51] I would reject this argument.

[52] Where a bonus is a non-discretionary and integral part of the employee's compensation package, damages for wrongful dismissal should include both the bonus actually earned before being terminated and the bonus that would have been earned during the notice period, unless the terms of the bonus plan alter or remove that right: see *Paquette*, at paras. 16-18; *Taggart v. Canada Life*

Assurance Co. (2006), 50 C.C.P.B. 163 (Ont. C.A.), at paras. 12-15; *Manastersky v. Royal Bank of Canada*, 2019 ONCA 609, at paras. 40-43. Although I agree that one could contract out of the requirement to pay a portion of a yearly bonus based upon what a terminated employee earned while he was working and would have earned during a notice period, that contract would have to be clear on its face. As noted in *Paquette*, at para. 31, the "question is not whether the contract or plan is ambiguous, but whether the wording of the plan unambiguously alters or removes the appellant's common law rights": see also *Lin v. Ontario Teachers' Pension Plan Board,* 2016 ONCA 619, 352 O.A.C. 10, at para. 89.

[53] There is nothing in the wording of the employment agreement in this case to suggest that the common law right to damages for lost bonus potential in the wake of a termination without cause was contracted out of. I see no error in the motion judge's finding that the "good standing clause" is tantamount to the "actively employed" clause in *Paquette*.

[54] As noted in *Paquette*, at para. 16, damages for wrongful dismissal will typically include "all of the compensation and benefits that the employee would have earned during the notice period": see also *Davidson v. Allelix Inc.* (1991), 7 O.R. (3d) 581 (C.A.), at p. 589. Support for this proposition can be found in *Bain v. UBS Securities Canada Inc.*, 2018 ONCA 190, 46 C.C.E.L. (4th) 50, albeit in a different context involving a deferred bonus plan. In *Bain,* this court determined

that a bonus “earned” by way of notional shares during a notice period could vest after the notice period ended. The appellant employer argued that the dismissed employee was only entitled to damages for lost bonus in respect of amounts he would have actually received prior to his termination and during the notice period. The court determined, at para. 15, that:

> [W]hile the notional shares would not have vested before the end of the reasonable notice period, there is no question that the bonus was “earned” by Bain during that period.

[55] Absent a contracting out, allowing for common law damages that include compensation in lieu of a *pro rata* share of a bonus in circumstances where the bonus is an integral part of the compensation package is the only sensible approach. Although the notice period in this case ended a few months before the bonus would have come due, one can well imagine a scenario in which the notice period could expire on the very eve of the bonus payment date. In those circumstances, the appellant’s position would lead to the untenable result that the dismissed employee would get no part of the bonus he or she had earned through a combination of his or her labour during that calendar year and over the course of the notice period that followed.

[56] The greater the bonus in relation to the employee’s overall compensation and the shorter the notice period, the greater the unfairness of the situation. By way of example, if the appellant is right, then an employee who is terminated in

early December, but only eligible to a couple of weeks of notice, would not be eligible to seek damages for a *pro rata* share of his or her bonus for the eleven months of work he or she completed and the short notice period that followed. Absent clear language in the contract, I do not accept the inherent unfairness that would arise in precluding those employees terminated without cause from seeking a *pro rata* share of their bonuses only by virtue of the fact that the notice period ended before the bonus payment date, particularly where the bonus payment date is entirely in the discretion of the employer.

[57] Accordingly, the question is not whether the bonus would have been "received" during the notice period, but whether it whether it was "earned" or "would have been earned" during that period. Damages may be sought as compensation for what an employee would have earned had his or her contract of employment not be breached. This reasoning is similar to *Taggart* where an active service prerequisite to the accrual of pension benefits did not preclude damages for lost pension benefits during the notice period after wrongful dismissal. As noted by Sharpe J.A. in *Taggart*, it is important to recall the legal nature of the claim. In *Taggart,* the legal nature of the claim was not for the benefits themselves, but for "damages as compensation for the … benefits the [employee] would have earned had the [employer] not breached the contract of employment": at para. 16 (emphasis added). Equally, the claim here was not for

the bonus itself, but for the share of the bonus that the respondent would have earned had the appellant not breached the contract of employment.

[58] I do not read the *Paquette* decision as turning on the narrow point that the dismissed employee was still within the notice period when the bonus came due. The fact is that the dismissed employee in *Paquette* only claimed damages in lieu of his bonus for the periods of time when it would have come due while the notice period was still operative. The reasons in *Paquette* are responsive to that position. The decision should not be read, though, as being limited to only those cases where the notice period continues to run at the time when the bonus would have otherwise come due if the employee had not been terminated without cause.

[59] Both *Lin* and *Singer v. Nordstrong Equipment Limited,* 2018 ONCA 364, 47 C.C.E.L. (4th) 218 lend support to the availability of damages on a *pro rata* basis for lost bonus potential.

[60] In *Lin*, a decision released on the same day as *Paquette,* this court considered a similar issue to what is now raised by the appellant. The trial judge had awarded damages for bonuses that the employee would have received under two bonus compensation plans constituting about 60 percent of his annual compensation. The bonus payments were given in April of each year for the "performance period" ending on December 31 of the previous year: *Lin,* at para.

58. The employee was terminated in March 2011 and was ultimately granted a 15-month period of reasonable notice. That meant that the notice period extended to June 2012.

[61] The trial judge awarded damages for the bonuses that the employee would have received under the two different plans in April 2011 and April 2012. He also granted damages for the bonus the employee would have received under one of the plans for the period of time between January 1 and June 22, 2012. On appeal, this court rejected the employer's argument that language in the bonus plans about termination disentitled the employee from receiving any bonus compensation once he was terminated. It determined that the employee was entitled to compensation for lost bonuses under the plans, including the *pro rata* share under the one plan for the period from January 1 to June 22, 2012, because, absent clear language limiting a terminated employee's common law rights, an employee is entitled to "the bonus he or she would have earned during the period of reasonable notice, as a component of damages for wrongful dismissal": *Lin,* at para. 89.

[62] Equally, in *Singer*, this court concluded that the appellant employee should receive damages for the lost opportunity to earn his bonus during the entire notice period, including a period of time that would have exceeded the yearly bonus payout. In setting aside the motion judge's decision rejecting the employee's claim for an amount to compensate him for the loss of that bonus,

Feldman J.A. concluded that there was nothing in the employment contract that removed the employee's entitlement to a full share of the bonus he would have earned during the notice period.

[63] Although none of the parties in *Lin* or *Singer* specifically questioned whether damages can be ordered on a *pro rata* basis for part of a bonus year, the fact remains that this court made that type of order in *Singer* and upheld that type of order in *Lin.*

[64] I see nothing in the employment agreement in this case that disentitled the respondent to a *pro rata* share of his bonus for the period of time that he actually worked and the period of notice granted.

(3) The Respondent Was Entitled to Compensation for Loss of Employment Benefits During the Notice Period

[65] In light of my conclusion that the motion judge did not err in determining that the respondent was entitled to the common law notice period, I would accept the appellant's reasonable concession that the motion judge erred in failing to grant damages for benefits lost during that period. The failure to do so is contrary to *Davidson* and *Singer*. I accept the parties' agreement that ten percent above the respondent's base salary over the reasonable notice period is the appropriate value to assign to those lost benefits.

CONCLUSION

[66] I would dismiss the appeal and grant the cross-appeal.

[67] I would order that the total amount of the judgment be increased by $8,500, which represents ten percent of the respondent's base salary of $170,000 per annum over the eight-month common law notice period, minus the benefits already provided by the appellant under the *ESA.*

[68] On the agreement of the parties, the appellant will pay $25,000 in costs to the respondent inclusive of disbursements and taxes.

Released: "MF" AUG 30 2019

"Fairburn J.A."
"I agree. M. Tulloch J.A."
"I agree. C.W. Hourigan J.A."